

FILED

MAY 17 2016

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIAUNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 12-22391-B-13
)
 ROBERT CHARLES KELLER and) DC No. SJS-006
)
 FINLEY JONES KELLER,)
)
 Debtor(s).)
 _____)

**MEMORANDUM AND ORDER DENYING MOTION FOR CONTEMPT AND SANCTIONS
FOR VIOLATION OF THE AUTOMATIC STAY AND CONFIRMATION ORDER****I. INTRODUCTION**

Presently before the court is the Debtors' Motion for Order to Show Cause for Contempt of the Automatic Stay and Confirmation Order filed by debtors Robert Charles Keller and Finley Jones Keller. Debtors seek sanctions against Shellpoint Mortgage Servicing, Shellpoint's CEO Saul Sanders, Bank of New York Mellon fka the Bank of New York (collectively, "Respondents") for alleged violations of the automatic stay of 11 U.S.C. § 362(a)(6) which prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." Debtors also seek contempt sanctions under §§ 105(a) and 1327(a) for Respondents' alleged violation of the confirmation order. Debtors maintain Respondents violated the automatic stay and the confirmation order by reporting adverse credit information after they filed their chapter 13 petition on February 7, 2012.

The court has carefully reviewed the motion and opposition, each of their corresponding memorandum of points and authorities,

1 and all related declarations and exhibits. No reply was filed.
2 The court also heard and has considered the statements and
3 arguments of counsel made during the hearing held on April 5,
4 2016. And the court takes judicial notice of the docket in this
5 case pursuant to Federal Rule of Evidence 201. This memorandum
6 and order constitutes the court's findings of fact and
7 conclusions of law pursuant to Federal Rule of Civil Procedure
8 52(a) made applicable by Federal Rules of Bankruptcy Procedure
9 7052 and 9014. For the reasons explained below, the debtors'
10 motion will be denied with prejudice.

11 12 **II. JURISDICTION**

13 Federal subject-matter jurisdiction is founded on 28 U.S.C.
14 § 1334. This matter is a core proceeding that a bankruptcy judge
15 may hear and determine. 28 U.S.C. §§ 157(b)(2)(A), (G), (L), and
16 (O). To the extent it may ever be determined to be a matter that
17 a bankruptcy judge may not hear and determine without consent,
18 the parties nevertheless consent to such determination by a
19 bankruptcy judge. 28 U.S.C. § 157(c)(2). Venue is proper under
20 28 U.S.C. § 1409.

21 22 **III. BACKGROUND**

23 On or about February 23, 2004, debtors executed a promissory
24 note payable to Countrywide Home Loans in the original principal
25 amount of \$340,000. The note is secured by a deed of trust on
26
27
28

1 the debtors' residence.¹

2 The debtors filed a fifth amended plan on or about August
3 28, 2012. The court confirmed the fifth amended plan on or about
4 October 19, 2012. The confirmation order was entered on or about
5 December 10, 2012.

6 The confirmed fifth amended plan provides for Bank of
7 America (and thereby presumably Bank of New York Mellon/Bank of
8 New York) in Class 1. It also provides for payments of that
9 creditor's pre-petition arrears and maintenance of ongoing
10 contractual installments due under the note and deed of trust by
11 the chapter 13 trustee. The debtors have made all payments under
12 the confirmed fifth amended plan. And according to the chapter
13 13 trustee's records, pre-petition arrears were cured by March
14 31, 2015. The chapter 13 trustee continues to make ongoing
15 monthly payments on the note and deed of trust.

16 Mrs. Keller obtained a 3-bureau credit report (Experian,
17 Equifax, Transunion) on January 19, 2016. That report apparently
18 reflected the following:

19 Payment History: 120 to 90 days late on all three
20 bureau reports for March 2014 through December 2015.

21 Payment Status: Account reported as "past due 150
22 days," "at least 120 days or more then four payments
23 past due" and "120 days past due".

24 Past Due Balance: All three bureau reports lists the
25 account as \$9,297 past due.

26 Bankruptcy Status: Shellpoint failed to report that
27 account included in bankruptcy.

28 ¹At some point the note and deed of trust were transferred
to Bank of America N.A., and then to Bank of New York Mellon on
or about January 12, 2012, and then to Bank of New York on or
about August 16, 2014. Shellpoint is the loan servicer.

1 Mr. Keller also obtained a 3-bureau credit report (Experian,
2 Equifax, Transunion) on January 25, 2016. That report apparently
3 reflected the following:

4 Payment History: 120 to 90 days late to all three
5 bureaus for March 2014 through March 2015.

6 Past Due Balance: All three bureaus report list account
7 as \$9,297 past due.

8 On or about January 27, 2016, debtors were denied credit in
9 the purchase of a vehicle. The denial letter indicates that
10 credit was denied based on information creditor received from
11 Experian.

12 IV. DISCUSSION

13 A. The act of post-petition credit reporting is not, as a
14 matter of law, a per se violation of the automatic
15 stay.

16 The question before the court is a narrow one: Whether, as
17 a matter of law, the mere act of reporting adverse credit
18 information is a per se violation of § 362(a)(6). This somewhat
19 conflicts with the motion in which the debtors state that "[b]y
20 reporting misleading and inaccurate information on Debtors [sic]
21 credit reports, Shellpoint and Bank of NY Mellon have willfully
22 acted to collect on debt that is currently subject to the
23 automatic stay and this court's order confirming the plan in
24 violation of 11 U.S.C. §§ 105, 362 and 1327." [Dkt. 122 at 4:27-
25 5:2]. However, during oral argument on April 5, 2016, debtors'
26 counsel stated that accuracy of the credit information reported
27 was irrelevant. Counsel stated that any post-petition credit
28 report of adverse credit information is, as a matter of law, a
per se stay violation under § 362(a)(6) regardless of whether the

1 information reported is accurate or not. Framed in that light,
2 the court addresses only the narrow question presented.

3 In separate cases brought by the same law firm that
4 currently represents the debtors in this case, the United States
5 District Court for the Northern District of California has twice
6 rejected the idea that credit reporting is a *per se* violation of
7 the automatic stay. In Giovanni v. Bank of America, N.A., 2012
8 WL 6599681 (N.D. Cal. December 18, 2012), the debtor argued that
9 federal bankruptcy laws, § 362(a) in particular, barred Bank of
10 America from reporting negative credit information once she filed
11 her petition.² The debtor in Mortimer v. J.P. Morgan Chase Bank
12 N.A., 2012 WL 3155563 (N.D. Cal. August 2, 2012), made a nearly
13 identical argument asserting that the automatic stay prohibited
14 the reporting of any negative information while the case was
15 pending.³ The court in both cases rejected the debtors'
16 arguments. Giovani, 2012 WL 6599681 at *5; Mortimer, 2012 WL
17 3155563 at *3. In Giovani, the court noted that the debtors

18
19 ²"Giovanni first argues that federal bankruptcy laws barred
20 BOA from reporting negative credit information once she filed her
21 bankruptcy petition, so BOA's report was inaccurate and
22 misleading. Opp'n, ECF No. 25 at 12. When a person files for
23 bankruptcy, 11 U.S.C. § 362(a) imposes an automatic stay on
24 collection activities. Giovanni argues that BOA's reporting late
payments on her debts is a 'prohibited creditor shenanigan.'
Opp'n, ECF No. 25 at 12[.]'" Id. at *5 (internal quotation
omitted).

25 ³"Mortimer claims, not that he made timely payments, but
26 that Chase's reporting violated the letter and the spirit of 11
27 U.S.C. § 362. Mortimer argues that this provision of the
28 Bankruptcy Code, which in general imposes a stay on creditors'
collection activities, prohibits Chase from reporting any
derogatory information arising while the bankruptcy petition was
pending." Id. at *3.

1 cited no case in which a court found post-petition credit
2 reporting alone to be a violation of the automatic stay.
3 Giovani, 2012 WL 6599681 at *6. And in Mortimer, the court noted
4 that nothing in the Bankruptcy Code prevents credit reporting
5 while a bankruptcy case is pending. Mortimer, 2012 WL 3155563 at
6 *3.

7 Not surprisingly, debtors attempt to distance this case from
8 Giovani and Mortimer by suggesting that neither case included an
9 analysis of the Bankruptcy Code, and both were decided in the
10 context of the Fair Credit Reporting Act ("FCRA"). Although the
11 latter point is accurate, there is little doubt that the notion
12 of a *per se* violation based on post-petition credit reporting was
13 raised and rejected in both Giovanni and Mortimer. Addressing
14 the former point, the debtors cite § 362(b)(2)(E) which excepts
15 from the automatic stay imposed under § 362(a) "the reporting of
16 overdue support owed by a parent to any consumer reporting agency
17 as specified in section 466(a)(7) of the Social Security Act[.]"
18 The debtors maintain the inclusion in § 362(b) of this single
19 instance of credit reporting as an exception to § 362(a) means
20 that all other instances of credit reporting are subject to and
21 prohibited by § 362(a). Debtors' argument is without merit.

22 Mahoney v. Washington Mutual, Inc. (In re Mahoney), 368 B.R.
23 579 (Bankr. W.D. Tex. 2007), is instructive. In Mahoney, the
24 court rejected the notion that, as a matter of law, the mere act
25 of credit reporting could amount to a *per se* violation of the
26 discharge injunction. Id. at 586. And while the court rejected
27 that argument in the context of § 524, its reasoning is grounded
28 in, and thus equally applicable to, § 362(a). Quoted at length

1 because of its significance, that reasoning is as follows:

2 Treating the mere act of credit reporting, without
3 more, as an act to collect on a debt would also fly in
4 the face of section 1651c(a)(1) [sic] of title 15.
5 Section 1651c [sic] mandates the exclusion of certain
6 items from consumer credit reports. It reads, in
7 relevant part:

8 Except as authorized under subsection (b) of
9 this section, no consumer reporting agency
10 may make any consumer report containing any
11 of the following items of information:

12 (1) Cases under Title 11 or under
13 the Bankruptcy Act that, from the
14 date of entry of the order for
15 relief or the date of adjudication,
16 as the case may be, antedate the
17 report by more than 10 years.

18 15 U.S.C. § 1681c.

19 *In other words, Congress expressly contemplates the*
20 *reporting of a bankruptcy case by credit bureaus for up*
21 *to 10 years after the bankruptcy filing date. See id.;*
22 *11 U.S.C. § 301(b) (filing of a voluntary bankruptcy*
23 *case constitutes an order for relief). It cannot be the*
24 *case that Congress both allows ten years of reporting*
25 *that an individual has had a case under title 11, while*
26 *at the same time barring a creditor from simply*
27 *reporting such information to a consumer reporting*
28 *agency in the first place.*

368 B.R. at 586 at n.3 (emphasis added).

19 Mahoney's reasoning that Congress would not prohibit in one
20 federal statute, *i.e.*, the Bankruptcy Code, that which it
21 expressly allows in another, *i.e.*, the FCRA, is persuasive.

22 Congress has historically harmonized the FCRA with the Bankruptcy
23 Code. Indeed, the FCRA, as enacted in 1970, see title VI of
24 Pub.L. 91-508, and amended in 1978, see P.L. 95-598, harmonized
25 its references in § 1681c(a)(1) with the Bankruptcy Code.

26 Moreover, the scope of the stay was well-developed both in 1970
27 and 1978. See In re Bradley, 38 B.R. 425, 427-28 (Bankr. C.D.
28 Cal. 1984). And at both points in time, the scope of the

1 automatic stay would have been well known to Congress. U.S. v.
2 Hunter, 101 F.3d 82, 85 (9th Cir. 1996). Yet, on at least two
3 noted occasions, Congress made clear in § 1681c(a)(1) of the FCRA
4 that the act of credit reporting could continue from and after
5 the entry of an order for relief (and for a period of ten years
6 thereafter) notwithstanding § 362(a) and, importantly,
7 notwithstanding its knowledge of the scope of § 362(a). And
8 because of that, there was no need for Congress to include in §
9 362(b) any general exception for what Congress understood was not
10 subject to the reach of § 362(a) in the first instance.

11 To read § 362(b)(2)(E) as the debtors suggest, *i.e.*, that it
12 creates a singular and exclusive exception to § 362(a) for credit
13 reporting, would require the court to conclude that Congress
14 intended to invalidate a significant provision of the FCRA, *i.e.*,
15 § 1681c(a)(1), through and with an amendment to the Bankruptcy
16 Code, *i.e.*, § 362(b)(2)(E). Not only is that an absurd result,
17 but, that conclusion is wholly inconsistent with Congress'
18 historical efforts to ensure that § 1681c(a)(1) of the FCRA is
19 consistent with the Bankruptcy Code.

20 A better understanding of § 362(b)(2)(E), and one consistent
21 with Congressional efforts to harmonize the FCRA and the
22 Bankruptcy Code, is that § 362(b)(2)(E) was added through BAPCPA
23 in 2005 to give parents asserting rights under § 1681s-1 of the
24 FCRA where those rights did not previously exist. In other
25 words, whereas § 1681s-1 of the FCRA speaks of credit reports
26 that include overdue support information received from or
27 verified by a state or local agency, under § 362(b)(2)(E) such
28 reports may now include information received directly from a

1 parent to whom overdue support is owed. In that respect, §
2 362(b)(2)(E) is an expansion of the existing credit reporting
3 exclusion to § 362(a) recognized in § 1681c(a)(1) of the FCRA.

4 In re Sommersdorf, 139 B.R. 700 (Bankr. S.D. Ohio 1991),
5 cited by the debtors, does not require a contrary result. In
6 fact, the court does not find Sommersdorf at all persuasive and
7 declines to follow it for several reasons. First, Sommersdorf
8 did not consider the interplay between the FCRA and the
9 Bankruptcy Code discussed above. Second, Sommersdorf's per se
10 analysis has been rejected or largely not followed. See Mahoney,
11 368 B.R. at 586 (rejecting as support for per se violation of
12 discharge injunction); In re Burkey, 2012 WL 5959991 at *4-5
13 (Bankr. N.D. N.Y. November 28, 2012) (rejecting as support for
14 per se violation of co-debtor stay); see also In re Stacker, 2011
15 WL 182846 (Bankr. S.D. Ill. January 20, 2011); In re Gordon, 2000
16 WL 713742 (Bankr. E.D. Pa. May 1, 2000); In re Thistle, 1998 WL
17 35412015 at 6-7 (Bankr. E.D. Va. July 17, 1998). And third, the
18 weight of what little authority exists correctly recognizes that
19 act of credit reporting alone, even reporting of adverse
20 information, is not a per se stay violation. See Hickson v. Home
21 Federal of Atlanta, 805 F.Supp. 1567, 1573 (N.D. Ga. 1992),
22 aff'd, 14 F.3d 59 (11th Cir. 1994) (holding that a legitimate
23 report to a credit agency regarding a debtor's indebtedness, even
24 if done post-petition, is not a stay violation and reasoning that
25 § "362 contains no language prohibiting creditors or any other
26 party from making legitimate reports to credit agencies regarding
27 parties that have filed for bankruptcy."); Burkey, 2012 WL
28 5959991 at *4; In re Smith, 2000 WL 33710884 at *4 (Bankr. D.S.C.

1 2000) (rejecting debtor's argument that post-petition credit
2 report of negative credit information violated § 362(a)(6),
3 noting other provisions of federal law permitted reporting, and
4 concluding reporting was not an act to collect because it did not
5 extract payment even if it facilitated it); see also Abeyta v.
6 Bank of America N.A., 2016 WL 304308 (D. Nev. January 25, 2016).

7 In sum, answering the sole question before it, the court
8 concludes that the mere act of reporting adverse credit
9 information after an order for relief is entered is not, as a
10 matter of law, a per se violation of § 362(a). Therefore, the
11 debtors' request for sanctions against Respondents under § 362(k)
12 based on a purported violation of § 362(a)(6) by continuing to
13 report credit information after the debtors filed their chapter
14 13 petition will be denied with prejudice.

15 B. Respondents' post-petition credit reporting did not
16 violate the confirmation order.

17 Debtors also argue that Respondents' post-petition credit
18 reporting violated the confirmation order. The court disagrees.

19 A violation of the confirmation order invokes § 1327(a) and
20 may be remedied by a contempt order under § 105. See In re
21 Dendy, 396 B.R. 171, 179-80 (Bankr. D.S.C. 2008) (citation
22 omitted). "The standard for finding a party in civil contempt is
23 well settled: The moving party has the burden of showing by
24 clear and convincing evidence that the contemnors *violated a*
25 *specific and definite order of the court.*" Renwick v. Bennett
26 (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002) (emphasis
27 added).

28 The court order at issue here is the confirmation order.

1 The problem with the debtors' argument is that the confirmation
2 order does not require Respondents to report - or not report -
3 anything. In other words, it neither directs nor prohibits
4 credit reporting. On that matter, both the confirmed plan and
5 the confirmation order are silent.

6 The debtors correctly note that § 2.08(b)(5) of the
7 confirmed plan states that the "[p]ost-petition payments made by
8 Trustee and received by the holder of a Class 1 claim shall be
9 *applied* as if the claim were current and no arrearage existed on
10 the date the case was filed." (Emphasis added). From that
11 provision, the debtors maintain the confirmed plan requires
12 "Shellpoint, its heirs and assigns, to (1) *report* all timely made
13 post-petition payments as being current as though no default
14 existed[.]." (Emphasis added). The Debtors read too much into
15 the language of the confirmed plan.

16 In order to reach the conclusion the debtors' suggest, the
17 court has to infer a nexus between the application and reporting
18 of payments. In other words, the court has to read into the
19 confirmed plan what the confirmed plan does not expressly state.
20 That means - at least with respect to credit reporting - the
21 debtors' confirmed plan is not direct and specific. And
22 "[w]ithout a specific command in the plan for [Respondents] to
23 [act], the Court cannot find that these parties have committed an
24 act of contempt." Dendy, 396 B.R. 181.

25 In sum, the debtors may have a remedy if Respondents' post-
26 petition reporting does not match Respondents' application of
27 debtors' post-petition payments under the confirmed plan.
28 However, in this case, that remedy is not under the Bankruptcy

1 Code and it certainly is not for contempt under § 105(a) through
2 § 1327(a). Accordingly, the debtors' motion to hold Respondents
3 in contempt under § 105(a) for violation of the confirmation
4 order through § 1327(a) will also be denied with prejudice.
5

6 **V. CONCLUSION**

7 Based on the foregoing, the court finds and concludes that
8 post-petition credit reporting is not, as a matter of law, a *per*
9 se violation of the automatic stay. The court also finds and
10 concludes that, in this case, Respondents' post-petition credit
11 reporting did not violate the confirmation order under § 1327(a)
12 and Respondents are not subject to contempt under § 105(a).
13 Therefore,

14 IT IS ORDERED that the debtors' Motion for Order to Show
15 Cause for Contempt of the Automatic Stay and Confirmation Order
16 [Dkt. 122] is DENIED WITH PREJUDICE.

17 IT IS FURTHER ORDERED that the continued hearing set for May
18 17, 2016, at 1:00 p.m. is VACATED.

19 Dated: May 17, 2016.

20
21 
22 UNITED STATES BANKRUPTCY JUDGE
23
24
25
26
27
28

**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Scott J. Sagaria
2033 Gateway Place, Floor 5
San Jose CA 95110

Behzad B. Mohandesi
633 W 5th St #2800
Los Angeles CA 90071